

1 **(March 13, 1995)**

2 **Procedure And Protest By The Contractor**

3 Section 1-04.5 is deleted in its entirety and replaced by the following:

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5 The Contractor accepts all requirements of a change order by: (1) endorsing it,
6 (2) writing a separate acceptance, or (3) not protesting in the way this section
7 provides. A change order that is not protested as provided in this section shall be
8 full payment and final settlement of all claims for contract time and for direct,
9 indirect, and consequential costs, including costs of delays, related to any work
10 either covered or affected by the change. By not protesting as this section
11 provides, the Contractor also waives any additional entitlement and accepts from
12 the Engineer any written or oral order (including directions, instructions,
13 interpretations, and determinations).

14
15 If in disagreement with anything required in a change order, another written order,
16 or oral order from the Engineer, including any direction, instruction, interpretation,
17 or determination by the Engineer, the Contractor shall immediately give a signed
18 written notice of protest to the Project Engineer or the Project Engineer's field
19 inspectors before doing the work. If this notice does not result in resolution of the
20 protest within seven calendar days, the Contractor or the Contracting Agency may
21 pursue the Disputes Resolution procedures provided in this section.

22
23 In spite of any protest, dispute, or claim the Contractor shall proceed promptly and
24 diligently with the work as the Engineer orders. The Contractor shall also proceed
25 without delay to perform the work or to conform to the decision or order of the
26 Engineer while waiting for written responses from the Engineer or
27 recommendations from the Disputes Review Board.

28
29 Throughout any protested work, the Contractor shall keep complete records of
30 extra costs and time incurred. The Contractor shall permit the Engineer access to
31 these and any other records needed for evaluating the protest.

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33 **Disputes Resolution**

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35 In order to assist in the resolution of disputes or claims arising out of the work
36 of this project, the Contracting Agency has provided for the establishment of
37 a Disputes Review Board, hereinafter called the "BOARD". The BOARD has
38 been added to the disputes resolution process to be brought into play when
39 normal Contracting Agency-Contractor dispute resolution is unsuccessful and
40 prior to a formal adoption of position or filing of litigation by either party.

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42 **A. Disputes**

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44 Disputes, as used in this Section, will include disagreements, claims,
45 counterclaims, matters in question, and differences of opinion between
46 the Contracting Agency and Contractor:

- 47
48 1. On matters related to the work and to change order work, including:
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50 a. Interpretation of the Contract.
51
52 b. Costs.
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54 c. Time for performance.
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56 2. And on other subjects mutually agreed by the Contracting Agency
57 and Contractor to be of concern of the BOARD.

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2 B. Resolution Procedure
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4 The following procedure shall be used for dispute resolution:
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- 6 1. If seven calendar days have expired since the Contractor provided
7 the signed written notice of protest provided above and the
8 Contractor continues to object to any decision or order of the
9 Engineer, the Contractor shall request, in writing, written
10 instructions from the Engineer.
11
- 12 2. The Engineer shall respond, in writing, to the Contractor's written
13 request within 15 calendar days.
14
- 15 3. Within 30 calendar days after receipt of the Engineer's written
16 instructions, the Contractor shall, if the Contractor still objects to
17 such instructions, supplement the written protest to the Engineer
18 with a written statement providing the following:
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 - 20 a. The date of the protested order,
 - 21 b. The nature and circumstances which caused the protest,
 - 22 c. The contract provisions that support the protest,
 - 23 d. The estimated dollar cost, if any, of the protested work and how
24 that estimate was determined, and
 - 25 e. An analysis of the progress schedule showing the schedule
26 change or disruption if the Contractor is asserting a schedule
27 change or disruption.
28
- 29 4. The Engineer will consider the supplemented written protest and
30 make a decision on the basis of the pertinent contract provisions
31 and facts and circumstances involved in the dispute. The decision
32 will be furnished in writing to the Contractor within 60 calendar days.
33 This decision shall be final and conclusive on the subject unless a
34 written appeal is filed by the Contractor. Should the Contractor
35 appeal the Engineer's decision, the matter can be referred to the
36 BOARD by either the Contracting Agency or the Contractor.
37
- 38 5. The Contractor's appeal for review must be instituted within 30
39 calendar days of the date of receipt of the Engineer's decision.
40
- 41 6. The Contractor and the Contracting Agency shall each be afforded
42 an opportunity to be heard by the BOARD and to offer evidence.
43 Either party furnishing any written evidence or documentation to the
44 BOARD must furnish copies of such information to the other party a
45 minimum of 15 calendar days prior to the date the BOARD sets to
46 convene the hearing for the dispute. Either party shall produce
47 such additional evidence as the BOARD may deem necessary to an
48 understanding and determination of the dispute and furnish copies
49 to the other party.
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7. The BOARD's recommendations toward resolution of a dispute will be given in writing to both the Contracting Agency and the Contractor. The recommendations will be based on the contract provisions and the actual costs and/or time incurred.
8. Within 30 calendar days of receiving the BOARD's recommendations, both the Contracting Agency and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved.
9. Although both parties should place weight upon the BOARD's recommendations, the recommendations are not binding. Either party may appeal a recommendation of the BOARD to them for reconsideration. However, reconsiderations shall only be allowed when there is new evidence to present.
10. If the Contracting Agency and the Contractor are able to resolve their dispute with the aid of the BOARD's recommendations, the Contracting Agency will promptly process any contract changes.
11. In the event the BOARD's recommendations do not resolve the dispute, all BOARD records, and written recommendations, including any minority reports, will be admissible as evidence in any subsequent litigation.

C. Litigation

1. Submittal of dispute to the BOARD shall be a condition precedent to filing for litigation in a court of law unless the Contracting Agency and the Contractor have agreed to defaulting to Section 1-09.11(2), Claims.
2. Claims, counterclaims, disputes, and other matters in question between the Contracting Agency and Contractor that are not resolved will be decided in the Superior Court of Thurston County, Washington, which shall have exclusive jurisdiction and venue over all matters in questions between the Contracting Agency and the Contractor.
3. The Contract shall be interpreted and construed in accordance with the laws of the State of Washington.

D. Purpose and Function of the BOARD

The BOARD will be an advisory body created to assist in the resolution of claims, disputes, or controversy between the Contractor and the Contracting Agency in order to prevent construction delay and possible court litigation.

The BOARD will consider disputes referred to it, and furnish recommendations to the Contracting Agency and Contractor to assist in the resolution of the differences between them. The BOARD will essentially be making nonbinding findings and recommendations and provide special expertise to assist and facilitate the resolution of disputes.

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2 E. BOARD Members
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4 The BOARD shall consist of one member selected by the Contracting
5 Agency and one member selected by the Contractor, with these two
6 members to select the third member. The first two members shall be
7 mutually acceptable to both the Contracting Agency and the Contractor.
8 If one or both of the two members selected are not acceptable to the
9 Contracting Agency or Contractor, another selection shall be made.

10
11 The Contracting Agency and Contractor shall each select their member
12 and negotiate an agreement with their respective BOARD members
13 within the first 60 calendar days after award of the contract. These
14 negotiated agreements shall include a clause that requires the
15 respective selected members to immediately pursue selection of the
16 third member in accordance with Section IIA of the DISPUTES REVIEW
17 BOARD THREE PARTY AGREEMENT in the Appendix of these
18 Special Provisions.

19
20 In the event of an impasse in selection of the third member, either the
21 Contracting Agency or the Contractor or both may appeal to the
22 Thurston County Superior Court for selection of a third member by the
23 court from a list or lists submitted to the court by the Contracting Agency
24 and/or the Contractor. An impasse shall be considered to have been
25 reached if the two members appointed by the Contracting Agency and
26 the Contractor for the BOARD have been unable to appoint the third
27 member in a period of 60 calendar days after the approval of the last of
28 such two members.

29
30 In case a member of the BOARD needs to be replaced, the replacement
31 member will be appointed in the same manner as the replaced member
32 was appointed. The appointment of a replacement BOARD member will
33 begin promptly upon determination of the need for replacement and shall
34 be completed within 30 calendar days. The Three Party Agreement will
35 be amended to reflect the change of a BOARD member.

36
37 Service of a BOARD member may be terminated at any time with not
38 less than 30 calendar days notice as follows:

- 39
40 1. The Contracting Agency may terminate service of the Contracting
41 Agency appointed member.
42
43 2. The Contractor may terminate service of the Contractor appointed
44 member.
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46 3. The third member's services may be terminated only by agreement
47 of the other two members.
48
49 4. By resignation of the member.
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51 5. Termination of a member will be followed by appointment of a
52 substitute as specified above.
53

54 No member shall have a financial interest in the contract, except for
55 payments for services on the BOARD. No member shall have been
56 employed by either party within a period of two years prior to award of
57 this contract; except that, service as a member of other Disputes Review

Boards on other contracts will not preclude a member from serving on the BOARD for this contract.

The BOARD members will be especially knowledgeable in the field of construction of the type covered by the Contract and shall discharge their responsibilities impartially and independently considering the facts and conditions related to the matters under consideration and the provisions of the Contract .

F. BOARD Operation

The BOARD will formulate its own rules of operation. In order to keep abreast of the construction development, the members shall regularly visit the project, keep a current file, and regularly meet with the other members of the BOARD and with representatives of the Contracting Agency and the Contractor.

The frequency of these visits shall be as agreed between the Contracting Agency, the Contractor, and the BOARD.

For further description of work, responsibilities and duties of the BOARD, and the Contracting Agency's and Contractor's obligations and responsibilities with respect to each other and to the BOARD, see the DISPUTES REVIEW BOARD THREE PARTY AGREEMENT in the Appendix of these Special Provisions.

G. Service Agreements and Compensation

Service agreements with BOARD members appointed by the Contracting Agency and Contractor shall be negotiated by the Contracting Agency and Contractor, respectively. The service agreement with the third member shall be negotiated with the other two members.

All the service agreements, shall be executed in forms mutually acceptable to the Contracting Agency and Contractor.

Compensation for the BOARD members, and the expenses of operation of the BOARD, shall be shared by the Contracting Agency and Contractor in accordance with the following:

1. The Contracting Agency will compensate directly the wages and travel expense for their selected member.
2. The Contractor shall compensate directly the wages and travel expense for their selected member.
3. The Contracting Agency and Contractor shall share equally in the third member's wages and travel, and all of the expenses of the BOARD. These equally shared expenses shall be billed to and paid by the Contracting Agency. The Contractor's share will be deducted from monies due the Contractor.
4. The Contracting Agency, through the Engineer, will provide administrative services, such as conference facilities and secretarial

1 services, to the BOARD and the Contracting Agency will bear the
2 costs for this service.
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4 H. Three Party Agreement

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6 The Contractor, the Contracting Agency, and all three members of the
7 BOARD shall execute the DISPUTES REVIEW BOARD THREE
8 PARTY AGREEMENT within 30 calendar days of the final selection of
9 the third member. The form of the Three Party Agreement is included in
10 the Appendix of these Special Provisions.
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12 I. Guidelines

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14 DISPUTES REVIEW BOARD GUIDELINES for the BOARD's operation
15 are included in the Appendix of these Special Provisions.
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17 These guidelines express in general terms the policy for the creation and
18 operation of the BOARD and are intended to supplement the Three
19 Party Agreement, the Special Provisions, and the Specifications to the
20 extent that no conflict with such provisions is created.
21

22 The Engineer will evaluate all protests provided the procedures in this section are
23 followed. If the Engineer determines that a protest is valid, the Engineer will
24 adjust payment for work or time by an equitable adjustment in accordance with
25 Section 1-09.4. Extension of time will be evaluated in accordance with Section 1-
26 08.8. No adjustment will be made for an invalid protest.
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28 By failing to follow the procedures of this section and Section 1-09.11, the
29 Contractor completely waives any claim for protested work.